Michigan Law
University of Michigan Law School
Michigan Innocence Clinic

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July 29, 2010

Mr. Corbin R. Davis, Clerk
Michigan Supreme Court
P.O. Box 30052
Lansing, MI 48909

Re: ADM File No. 2009-19

Dear Mr. Davis:

I am writing to comment on the portion of ADM File No. 2009-19 that would add a new MCR 6.502(H) and thereby impose a one-year statute of limitations for criminal defendants filing motions for relief from judgment ("6500 motions").

I am a clinical professor of law and the co-director of the Michigan Innocence Clinic at the University of Michigan Law School. The Clinic, which opened in January 2009, investigates claims of actual innocence by Michigan inmates. We have, to date, reviewed approximately 1200 requests for assistance (out of some 4000 enquiries received so far), and we have accepted 12 cases. In most of our accepted cases, we have begun our representation by filing 6500 motions based on evidence of actual innocence that had never before been presented in court.

So far, our students have achieved final exonerations of three innocent men, Dwayne Provience, Deshawn Reed, and Marvin Reed, all of whom had been wrongfully convicted in Wayne County. Between them, those three men served 25 years for crimes that the Clinic was able to convincingly show were committed by others. In addition, two more of our clients have been granted new trials, though both of those cases are still being litigated.

The proposal to put a rigid one-year time limit on 6500 motions, which originated from the Wayne County Prosecutor's Office, would shut the door for almost all actually innocent prisoners in Michigan and would therefore effectively shut down the Michigan Innocence Clinic. If this proposal had been in effect earlier, the three actually innocent men the Clinic has exonerated so far would still be in prison today, and all three of them would remain in prison for decades to come, at a cost of millions of dollars to the taxpayers, while the real perpetrators would continue to escape justice.

Just four years ago, in 2006, this Court rejected a less draconian proposal to amend MCR 6.508 that also would have put a one-year time limit on 6500 motions. The members of this Court who supported that earlier proposal stressed that that proposal would still have permitted actually innocent prisoners to file and win 6500 motions. *See* 2006 Staff Comment to MCR 6.508 (Corrigan, J., dissenting in part) ("Although claims of actual innocence could still proceed under the committee's approach, the attacks on the trial and appellate procedure, after a petitioner receives a full and fair opportunity to litigate, should end."); *id.* (Markman, J., dissenting in part) ("Although an offender must always be allowed to introduce genuinely new evidence of actual innocence, absent such evidence, there must come some reasonable point at which the criminal appellate process is finalized.").

Nothing has changed since 2006 (except the Michigan Innocence Clinic began operations and has filed several successful 6500 motions on behalf of demonstrably innocent prisoners who were convicted in Wayne County). And yet the new proposal would again impose a one-year time limit on filing 6500 motions, and the new proposal contains no exception for actual innocence.

The new proposal requires that a 6500 motion be filed within one year of the date the conviction becomes final with only one exception potentially applicable to a claim of actual innocence: a new one-year period would begin to run from the date "on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." The new proposal, it must be stressed again, contains no other exceptions that would allow an actually innocent defendant to file a 6500 motion more than one year after his or her conviction became final.

This proposal would effectively shut the Michigan Innocence Clinic down because it is impossible for us to screen the huge volume of requests we receive within one year of receiving them. As I mentioned earlier, we have received some 4000 requests from inmates seeking assistance. With our full complement of 12 students and volunteer attorneys from four law firms (Dykema, Foley Gardner, Bodman, and Orrick Herrington & Sutcliffe), we have, in 18 months, been able to review only about a third of those requests. There is simply no way we can review all of the nearly 3000 unreviewed requests we currently have within a year, much less the continuing stream of new requests we receive each and every day.

When a prisoner writes us, we send him a questionnaire in which we ask him to identify any new evidence that might be found that could prove him to be actually innocent. Under the new proposal, the fact that the prisoner was aware of a potential source of new, exculpatory evidence at the time he filled out the questionnaire would be proof that the new evidence could have been found with "due diligence" at that moment, if not before. Therefore, the time for filing a 6500 motion would have already run under the new proposal long before we even reviewed the questionnaire.

Even if we could review questionnaires the day we receive them, the vast majority of actually innocent prisoners would still be barred from presenting the evidence of their actual innocence under this proposal because their prior attorneys, using "due diligence," could have

and should have discovered the evidence years earlier. In other words, the new proposal would completely bar actually innocent defendants from presenting evidence of their innocence that wasn't presented before because of ineffective assistance of trial and appellate counsel.

Thus under this proposal, an innocent defendant, who normally would not have an attorney after his or her conviction was affirmed on appeal, would have to somehow discover the exculpatory evidence that his or her prior attorneys should have found and then present that new evidence in a 6500 motion within one year. If the innocent defendant finally learns about the exculpatory evidence 13 months after his conviction becomes final, he is completely barred by this proposal from ever filing a 6500 motion because his prior attorneys could have found that evidence through "due diligence."

I will use the remainder of this comment to describe the *Provience* case to illustrate how this proposal would guarantee that actually innocent defendants would be barred from ever presenting the evidence of their innocence.

Dwayne Provience

Dwayne Provience was convicted in January 2001 of the second-degree murder of Rene Hunter after a jury trial before the Hon. Timothy M. Kenny of the Wayne County Circuit Court. Mr. Provience was sentenced to 30-60 years and a consecutive two-year term for felony firearm. At trial, the only witness to implicate Mr. Provience in any way in the shooting was a crack-addicted homeless man named Larry Wiley. Mr. Wiley came forward with his account some three months after the shooting after Mr. Wiley was arrested for a burglary.

Mr. Wiley's account of the shooting differed in every material respect from the accounts given by seven eyewitnesses the day of the shooting. Those seven eyewitnesses, including an Oakland County sheriff's deputy, consistently described the shooters as being in a grey Chevy Caprice Classic that turned northbound after the shooting. One of the eyewitnesses remembered the license plate numbers—734—but not the letters on the shooters' car. Mr. Wiley claimed that the shooters were Mr. Provience and his brother and they were in Mr. Provience's brother's beige Buick Regal, which went westbound after the shooting.

At trial, Mr. Provience's brother established that he only purchased the beige Buick Regal a month after the shooting. Judge Kenny acquitted Mr. Provience's brother. Unfortunately, Mr. Provience was represented at trial by a completely incompetent attorney, Reginald Hamilton (since disbarred), who neglected to call any of the eyewitnesses who would have contradicted Mr. Wiley. Mr. Provience was convicted by a jury.

Mr. Provience's appellate attorney neglected to litigate any issues of trial counsel's ineffectiveness for failing to call the seven eyewitnesses who would have contradicted Larry Wiley. Mr. Provience's conviction was affirmed and became final on June 30, 2003.

In 2006, Larry Wiley signed an affidavit admitting that his trial testimony against Mr. Provience was false. He further admitted that, in fact, he was not at the scene of the shooting at

all and that he made up his account to escape punishment for the burglary for which he was in jail at the time he came forward.

In early 2009, the Michigan Innocence Clinic took Mr. Provience's case to litigate: (1) the ineffectiveness of trial and appellate counsel for failing to call the seven eyewitnesses who would have contradicted Larry Wiley's account; and (2) the newly discovered evidence of Larry Wiley's recantation. Under the new proposal, both of these issues would have been barred. The patent ineffectiveness of trial and appellate counsel would have been completely insulated because the evidence supporting that claim, the testimony of the seven eyewitnesses, obviously could have been and should have been discovered at the time of trial. And Mr. Wiley's recantation was given some three years before the Michigan Innocence Clinic became aware of Mr. Provience's case.

As the Clinic further investigated Mr. Provience's case, our students discovered that the Wayne County Prosecutor's Office had argued a completely different theory as to who killed Rene Hunter in the course of a separate murder trial. In 2003, a man named Eric Woods confessed to a federal ATF agent that he had killed Rene Hunter's friend, Courtney Irving, exactly one month after Rene Hunter was killed. And Eric Woods told the ATF agent that he had been hired to kill Mr. Irving by Antrimone and Surrell Mosley because Mr. Irving was about to go to the police and implicate the Mosleys in the murder of Rene Hunter. *See People v Woods*, No 247306 at *1-2 (Mich App Sep 28, 2004) (describing Woods' confession and the Mosleys' involvement in the murder of Rene Hunter).

Further investigation by our students yielded a police report that had not been turned over to the defense in Mr. Provience's trial showing that several witnesses had seen the Mosleys getting into a grey Chevy Caprice Classic (exactly the type of car that the eyewitnesses had described) that followed Rene Hunter to the intersection where he was shot and killed.

The Clinic therefore added a *Brady v Maryland* claim to Mr. Provience's 6500 motion and, on November 4, 2009, the Wayne County Prosecutor's Office stipulated that Mr. Provience was entitled to a new trial. Mr. Provience was released that day after more than 9 years incarceration.

In preparation for a possible retrial, the students in the Clinic continued looking for information. In December 2009, our students, operating under a discovery order, found in the prosecutor's homicide file a document from April 2003 establishing that the Detroit Police and/or the Wayne County Prosecutor's Office knew in 2003 that Antrimone Mosley owned a grey Chevy Caprice Classic with license place 7CXM34 (the license plate thus matched the numbers recorded by the eyewitness who had recalled the numbers). Finally, on March 24, 2010, the Wayne County Prosecutor's Office dropped all of the charges against Mr. Provience.

If the new proposal had been in effect, the Wayne County Prosecutor's Office doubtless would have argued that the *Brady* claim was time-barred because Mr. Provience could have, with "due diligence," obtained the Michigan Court of Appeals unpublished opinion in the *Woods* case when it was issued in 2004. And the prosecutor would have argued that all of the rest of the

wrongfully withheld exculpatory information could have been found years earlier if Mr. Provience had found the *Woods* opinion in 2004.

In other words, if the new proposal had been in effect, the Wayne County Prosecutor would have argued, probably successfully, that all of Mr. Provience's claims were time-barred and it would matter not at all that the new evidence overwhelmingly shows that he is innocent and that Rene Hunter was murdered by Antrimone and Surrell Mosley. Mr. Provience would remain in prison for another twenty years.

Mr. Provience's case is illustrative of how the proposed change to MCR 6.502 will shut the door for almost all innocent defendants in Michigan and, therefore, effectively shut down the Michigan Innocence Clinic. This case is certainly not isolated.

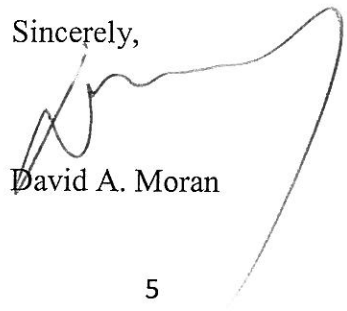
Like Mr. Provience, Marvin and Deshawn Reed would also still be in prison today if this proposal had been adopted a few years ago. On July 31, 2009, the Wayne County Prosecutor's Office agreed to dismiss the charges against the Reeds and Judge Patricia Fresard ordered the Reeds released, after eight years of wrongful incarceration, after the Michigan Innocence Clinic presented overwhelming evidence that another man, Tyrone Allen, shot the victim. As in the *Provience* case, much of the new evidence of innocence the Clinic discovered and presented was evidence that should have been presented by the Reeds' prior attorneys years earlier. As in *Provience*, therefore, the claims would have been barred if the new proposal had been in effect.

At its core, the new proposal betrays a deep distrust of Michigan's judiciary. Michigan judges are perfectly capable of weeding out and summarily denying stale and frivolous 6500 motions. Only rarely do judges require responses to 6500 motions from prosecutors and only very rarely are evidentiary hearings held.

In those cases where defendants can present evidence that they are actually innocent, they should not be barred from doing so by a time limit that would prevent an organization such as the Clinic from finding and presenting such cases in court. Nor should this Court adopt a time limit that would have the effect of almost completely insulating ineffective assistance of trial and appellate counsel claims from review even when that ineffective assistance consisted of failing to find and present evidence of actual innocence.

I therefore respectfully urge this Court not to adopt the portion of ADM File No. 2009-19 that would add a new subsection (H) to MCR 6.502. I thank the Court for its consideration of my comments.

Sincerely,



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